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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW LEE McKINNEY, Defendant and Appellant.	G052069 (Super. Ct. No. 13WF1634) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Vicky Lynn Hix, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Jason L. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Matthew Lee McKinney pleaded guilty to felony possession of methamphetamine and misdemeanor possession drug paraphernalia, and was resentenced on the methamphetamine count after he filed a petition pursuant to Penal Code section 1170.18.[1] He contends the paraphernalia count should have been stayed pursuant to section 654. We disagree and find substantial evidence supports the trial court's decision to impose consecutive terms. We therefore affirm.

I

FACTS

In February 2014, defendant pleaded guilty to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count one) and possession of controlled substance paraphernalia (Former Health & Saf. Code, § 11364.1, subd. (a), repealed by Stats. 2014, ch. 331, § 9; count two).

As the factual basis for his plea, defendant wrote: "In Orange County, California on 11/27/12, I willfully and unlawfully possessed a useable quantity of methamphetamine, knowing it was a controlled substance, and I possessed a pipe for smoking it and I admit as true, the alleged prior strike offense conviction indicated in the information."

The court imposed two years in prison on count one and suspended sentence on count two, which was a misdemeanor. In May 2015, defendant petitioned to have count one reduced to a misdemeanor pursuant to section 1170.18. The court granted the petition. Defendant was resentenced to one year in jail on count one, and 180 days consecutive on count two, for a total of 545 days. As defendant already had 744 days of credit, he did not have to serve any further jail time. He was placed on one year of parole pursuant to section 1170.18, subdivision (d).

[1] Subsequent statutory references are to the Penal Code unless otherwise indicated.

Defendant now appeals.

II

DISCUSSION

Defendant argues on appeal that his sentence on count two (for which he had already served all required time) should have been stayed pursuant to section 654. Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

"Section 654 does not preclude multiple convictions but only multiple punishments for a single act or indivisible course of conduct. [Citation.] 'The proscription against double punishment . . . is applicable where there is a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute . . . . The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one.'" (*People v. Miller* (1977) 18 Cal.3d 873, 885, overruled on other grounds as recognized in *People v. Oates* (2004) 32 Cal.4th 1048, 1067-1068, fn. 8.)

"On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts. [Citations.] The question whether the

defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.)

Due to the nature of the disposition of the matter through a plea agreement, we have little evidence upon which to rely. Defendant stated: "I willfully and unlawfully possessed a useable quantity of methamphetamine, knowing it was a controlled substance, and I possessed a pipe for smoking it . . . ." Defendant's statement is ambiguous; we cannot know for certain whether he meant smoking this particular methamphetamine or for using methamphetamine in general. It is certainly a reasonable inference that a durable item such as a pipe was intended to be used by defendant on more than one isolated occasion. Accordingly, we conclude there is substantial evidence to support the court's ruling.

III

DISPOSITION

The order is affirmed.

MOORE, ACTING P. J.

I CONCUR:

THOMPSON, J.

ARONSON, J., Dissenting:

I cannot agree with the majority's flawed reasoning and therefore dissent.

Matthew Lee McKinney pleaded guilty to possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 1) and possessing drug paraphernalia (Former Health & Saf. Code, § 11364.1, subd. (a), repealed by Stats. 2014, ch. 331, § 9; count 2). McKinney gave the following statement as the factual basis for his plea: "I willfully and unlawfully possessed a useable quantity of methamphetamine, knowing it was a controlled substance, and I possessed a pipe for smoking it . . . ." (Maj. opn. *ante*, at p. 4.) With this admission as the sole factual basis for his plea, McKinney contends that possession of the pipe and the methamphetamine formed part of an indivisible transaction and therefore the trial court violated Penal Code section 654's prohibition against multiple punishment when it imposed a consecutive sentence on the drug paraphernalia count.

The majority implicitly adopts McKinney's premise that Penal Code section 654 applies if the factual basis for McKinney's plea only can be interpreted to mean he possessed the pipe to smoke the methamphetamine he admitted possessing in count 1. The majority, however, finds his admission to be ambiguous, explaining "we cannot know for certain whether he meant smoking this particular methamphetamine or for using methamphetamine in general." (Maj. opn. *ante*, at p. 4.)

I disagree. One need only employ the basic rules of English grammar to see McKinney referred only to his possession of the methamphetamine that formed the basis of the possession charge in count 1. McKinney admitted possessing "a useable quantity of methamphetamine, knowing it was a controlled substance, and I possessed a pipe for smoking *it* . . . ." (Italics added.) The word "it" in McKinney's statement is a pronoun and has a definite antecedent, unlike an indefinite pronoun such as "anybody," "anyone," or "everyone." Grammatically, a pronoun is "used as a substitute for a noun or noun equivalent" (Webster's 3d New Internat. Dict. (1993) p. 1816), and the word or

phrase for which the pronoun substitutes is the pronoun's antecedent. In other words, an antecedent is "a substantive word, phrase, or clause referred to by a pronoun, typically by a following pronoun . . . [e.g.,] John in 'I saw John and spoke to him' . . . ," where the antecedent for the pronoun "him" is John. (*Id.* at p. 91.) An antecedent is similarly defined as "any word or group of words replaced and referred to by a substitute." (*Ibid.*) Here, McKinney admitted possessing a pipe for smoking "it."

The only logical conclusion is that the direct antecedent of the word "it" is the "useable quantity of methamphetamine" McKinney possessed and which alone formed the basis for count 1. The majority's conclusion McKinney may have been referring to methamphetamine "in general," rather than the methamphetamine which was the subject of count 1, is rank speculation and unsupported by any rational construction of McKinney's words. The plea's factual basis therefore shows he possessed the pipe to smoke the methamphetamine found in his possession.

Penal Code section 654 states in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." By its terms, the statute "bars multiple punishment not only for a single criminal act but for a single indivisible course of conduct in which the defendant had only one criminal intent or objective." (*People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603.) The trial court may impose separate punishment only if "a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Penal Code section 654 applies if all the offenses are incident to the one objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) A trial court's implied finding a defendant harbored a separate intent and objective for each offense will be upheld on appeal only if it is supported by substantial evidence. (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1310.)

By definition, "substantial evidence" requires *evidence* and not mere speculation. In any given case, one "may *speculate* about any number of scenarios that may have occurred . . . . A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." *People v. Morris* (1988) 46 Cal.3d 1, 21, italics in original, paragraph sign and internal quotation marks omitted.)

The criminal act McKinney committed in count 1 was to knowingly exercise dominion and control over a useable amount of a controlled substance. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.) The criminal act McKinney committed in count 2 was to knowingly exercise dominion and control over "a pipe." McKinney contends the factual basis for his guilty plea established these two crimes formed an indivisible transaction. He explained in his brief that the evidence here showed only he "two separate criminal acts to further one single criminal objective – to place himself under the influence of an illegal narcotic." I agree.

In the abstract, possession of drug paraphernalia does not facilitate possession of a controlled substance. Both constitute separate criminal acts. One type of possession does not facilitate another type of possession, and therefore each possession usually is independent of the other. But Penal Code section 654 determinations are fact driven and therefore offenses that bear no relation to each other in the abstract may nevertheless join to further a defendant's single criminal objective. (*In re Adams* (1975) 14 Cal.3d 629, 635 [simultaneous possession of different types of drugs may be separately punished but not if possession is motivated by a single intent and objective].)

Here, McKinney admitted he possessed the pipe to smoke the methamphetamine. His criminal intent or objective was to use the pipe to consume the methamphetamine. His criminal act of possessing the pipe therefore furthered or facilitated his single criminal objective of consuming the methamphetamine he possessed. There simply are

no other facts in the record to support a contrary conclusion. It is certainly possible, as the majority concludes, McKinney intended to use the pipe on another occasion. But a possibility, of course, is no substitute for evidence. Nothing in McKinney's statement supports the majority's view.

ARONSON, J.